IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY & ELECTRIC COMPANY,
GEORGIA RAILWAY & POWER COMPANY AND
GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

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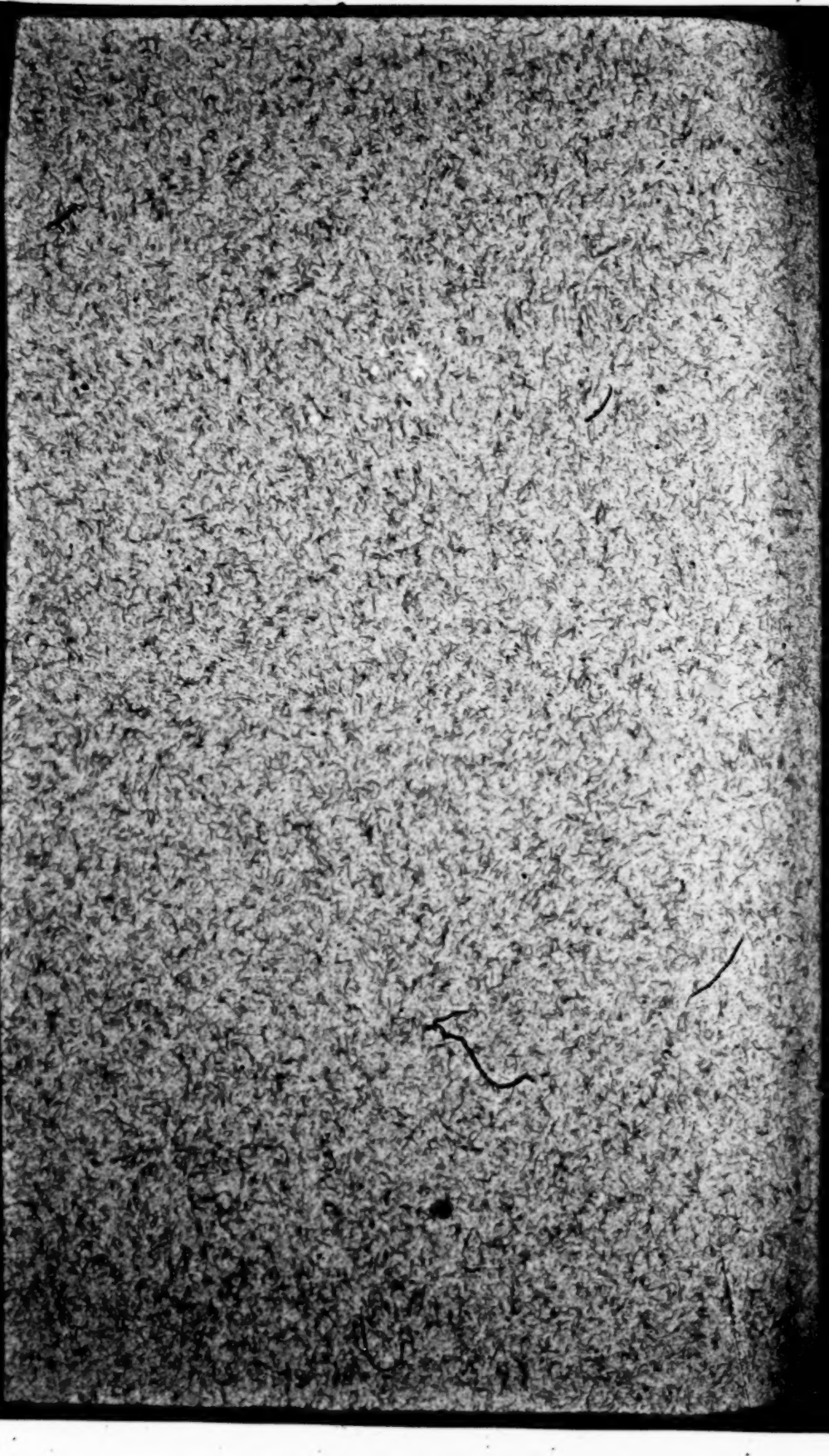

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Appellants,

v.

CITY OF DECATUR,

Appellee.

No. 625
October Term,
1935.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY

I.

OPINION AS DELIVERED IN THE COURT BELOW

As yet the opinion delivered in the case at bar by the Supreme Court of the State of Georgia has not been reported in the official Georgia Reports.

The opinion brought to this Court for review is found in the printed transcript of the record, pages 129–146.

II.

FEDERAL QUESTIONS INVOLVED SHOWING THE JURISDICTION OF THIS COURT

In accordance with Paragraph 1 of Rule 12 there has heretofore been compiled and filed with this Court a concise statement of the grounds on which the jurisdiction of this Court is invoked. Also in accordance with Rule Seven, (3), of the Supreme Court of the United States, appellants have filed a brief in opposition to appellee's motion to dismiss the appeal or affirm the decision of the Supreme Court of Georgia. In said brief the Federal questions involved showing the jurisdiction of this Court are discussed.

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

First: That the decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, (record pages 129-146) was not in conformity with the opinion and mandate rendered by the Supreme Court of the United States in this case on April 29th, 1935 (295 U. S. 165).

Second: The said decision of the Supreme Court of the State of Georgia denied appellants the right to introduce evidence on material issues in the cause and denied them the right to be heard to challenge the fact of appellants' liability or the amount of their liability for the paving assessment in question, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third: The Georgia statutes in question, as construed and enforced against appellants in said decision of the Supreme Court of the State of Georgia, are repugnant to the Fourteenth Amendment to the Con-

stitution of the United States in that they deny appellants the equal protection of the law and the due process of law as therein guaranteed.

III.

STATEMENT OF CASE

The case has heretofore been before this Court and on April 29, 1935, this court rendered an opinion (*Georgia Rwy. & Elec. Co. v. City of Decatur*, 295 U. S. 165), and issued its praecipe in which it ordered, adjudged and decreed that the decree of the Supreme Court of the State of Georgia (*Georgia Power Co. v. City of Decatur*, 179 Ga. 471, 490), be, and the same is hereby reversed and "that this cause be and the same is hereby remanded to the said Supreme Court (of Georgia) for further proceedings not inconsistent with the opinion of this Court."

On the 30th of September, 1935, the Supreme Court of the State of Georgia rendered a judgment of affirmance in said case upon the same record that was before the Supreme Court of the United States when this Court entered its judgment and decree of reversal. (Record Pages 129–146).

IV.

SPECIFICATION OF THE ASSIGNED ERRORS UPON WHICH A DECISION OF THIS COURT IS INVOKED

Appellants respectfully request a consideration and determination of each and all of the assignments of error made in the case at bar.

These assignments of error are set out on pages 151–158 of the printed transcript of the record and are as follows:

1. The opinion, judgment and decree of the Supreme Court of the State of Georgia (the highest Court of said State), rendered on the 30th of September, 1935, was erroneous in that it was inconsistent with the opinion, judgment, mandate and praecipe issued upon the same record and in the same case by the Supreme Court of the United States on the 29th of April, 1935.

2. The opinion, judgment and decree of the Supreme Court of the State of Georgia rendered on September 30, 1935, was erroneous in that it failed to give binding effect to the decision, opinion, judgment and praecipe rendered and issued upon the same record and in the same case by the Supreme Court of the United States on April 29, 1935, and in that it did not give effect to the said opinion of the Supreme Court of the United States as the law of the case according to the mandate issued by said Court to the Supreme Court of the State of Georgia.

3. The opinion, judgment and decree of the Supreme Court of the State of Georgia, rendered on the 30th of September, 1935, was erroneous in that the further proceedings had in the said Supreme Court of the State of Georgia were inconsistent with the opinion, judgment, mandate and praecipe rendered and issued upon the same record in the same case by the Supreme Court of the United States, as follows:

(a) The mandate of the Supreme Court of the United States ordered a reversal.

The judgment and decree of the Supreme Court of the State of Georgia was an affirmance.

(b) The opinion of the Supreme Court of the United States was that the Georgia assessment statutes in question contemplate "the existence of benefits to the railway company as the basis for the assessment."

The Supreme Court of the State of Georgia failed and refused to follow said opinion and decision as the law of the case.

(c) The opinion and decision of the Supreme Court of the United States held that the existence of benefits resulting from the paving improvement in question was a material and relevant issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States the Georgia Railway & Electric Company, Georgia Railway and Power Company and Georgia Power Company had ~~the~~ constitutional right to introduce pertinent evidence and proof to overcome a rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question and the improvement assessment ordinances made thereunder, and that the failure and refusal of the lower Court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived the said Companies of the due process of law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Georgia denied the said Companies the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question.

(d) The opinion and decision of the Supreme Court of the United States held that under the Georgia statutes and ordinances, authorizing and making assessment for the paving improvement in question against the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, without any compensating advantage was and is an arbitrary abuse of power amounting to the confiscation of the property of said companies in contravention of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Georgia failed and refused to give force and effect to said opinion and decision and did not accept and follow it as the law of the case.

(e) The mandate of the Supreme Court of the United States was that "the decree of the Court below must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion."

The Supreme Court of the State of Georgia without remanding said case to the trial Court for a hearing; without any order purporting to grant a re-hearing of said case in the Supreme Court of the State of Georgia; without change of the record in the case carried to said Court, and without notice to the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, entered a judgment of affirmance in said case.

4. The decision and judgment of the Supreme Court of the State of Georgia rendered on September 30, 1935, holding that under the charter amendments of the City of Decatur (Ga. Laws 1919, p. 934 et seq. and Ga. Laws 1924, p. 534, et seq.) legislative authority had been conferred upon said municipality to pave its streets and to assess a portion of the cost of such improvement against street railway companies occupying the street improved irrespective of benefits to the street railway company and that this authority comes both within the taxing and police power reserved in the State, was erroneous:

(a) In failing to accept and follow, as the law of the case, the construction of said statutes as set out in the opinion of the Supreme Court of the United States, rendered in said case.

(b) The said construction sought to be placed on said legislative acts (Ga. Laws 1919, p. 934 et seq. and Ga. Laws

1924, p. 534 et seq.) would render said statutes unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that said statutes, as thus construed, would deny to appellants, and each of them, the equal protection of the law and the due process of law as therein guaranteed, and confiscate the property of appellants in contravention of said Constitutional amendment, upon each of the following grounds:

(1) As against all other parties, the improvement assessments made under said legislative acts, must be based upon special benefits accruing to particular property affected thereby. As against street railway companies, and appellants in the instant suit, the paving assessment need not be based upon special benefits accruing to particular property affected thereby, nor upon benefits accruing to the owners of such property.

(2) As against all other parties, such improvement assessments cannot exceed the special benefits accruing to particular property specially benefited thereby, but as against street railway companies, and appellants, such assessment can exceed not only the special benefits resulting to the particular property affected thereby, but also all special benefits whatever resulting to the property owner.

In said suit there was drawn in question the validity and constitutionality of said statutes of the State of Georgia, and the decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes, as construed in said opinion of September 30, 1935, which decision is hereby assigned as error.

5. The decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, construed the Georgia Legislative amendments to the charter of the City of Decatur (Ga. Laws, 1919; p. 934 et seq. and Ga. Laws 1924, p.

534 et seq.) and municipal ordinances passed thereunder as not requiring any benefits to street railway companies or to any street railway company's property and as depriving street railway companies, and appellants, of any right to have the question of benefits, or the entire lack of benefits, presented, heard, passed upon or determined in any judicial hearing, and made the action of the municipality conclusive with reference to improvement assessments made against street railway companies. The said decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said Georgia Legislative Acts, as thus construed, and said decision is hereby assigned as error upon each of the following grounds:

(a) In failing to accept and follow, as the law of the case, the construction of said statutes as set out in the opinion of the Supreme Court of the United States, rendered in said case.

(b) Said construction of said Georgia Legislative Acts renders said Legislative Acts unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to appellants, and each of them, the equal protection of the law and due process of law as there guaranteed. Such construction of the said Legislative Acts and municipal ordinances passed thereunder makes the action of the municipality conclusive upon street railway companies and appellants and deprives them of the right of a judicial hearing on the question of the confiscation of their property; the entire lack of benefits, and on the question of the excessive amount of improvement assessment made against Appellants.

The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes and ordinances, as thus construed, and said decision is hereby assigned as error.

In said suit there was drawn in question the validity and constitutionality of said statutes of the State of Georgia (Ga. Laws 1919, p. 934 et seq. and Ga. Laws 1924, p. 534 et seq.) and ordinances passed thereunder, on the grounds that said statutes were repugnant to the Fourteenth Amendment of the Constitution of the United States, in that they deny to appellants, and each of them, the equal protection of the law and the due process of law as therein guaranteed.

6. The Supreme Court of the State of Georgia, in its opinion and decision rendered on the 30th of September, 1935, held that the failure of Appellants to take legal action to prevent or to enjoin the municipality from constructing the paving improvement in question, and its failure to enjoin the paving assessment made by the municipality, estops appellants from pleading the illegality and unconstitutionality of the assessment made against them in a suit at law brought for the collection of the amount of the assessment. The said decision was erroneous upon each of the following grounds:

(a) There was no pleading nor evidence in said case raising the question of estoppel.

(b) Appellants were given no hearing and no opportunity to be heard with reference to estoppel. All testimony and evidence tendered by appellants on the question of their liability was excluded, resulting in a denial of due process of law violative of the Fourteenth Amendment of the Constitution of the United States.

(c) The said decision was not in conformity with the decision of the Supreme Court of the United States rendered in said case on April 29, 1935, in which the Supreme Court (upon the same record as that before the Georgia Supreme Court) held that the refusal of the lower court to receive and consider proof and evidence offered by appellants

with reference to a lack of benefits, was in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

(d) The Georgia Legislative statutes (Ga. Laws 1919, p. 934, et seq. and Ga. Laws 1924, p. 534 et seq.), under which the paving improvements were constructed, and under which assessment therefor was sought to be made against appellants, as construed by the decision of the Supreme Court of the State of Georgia, prevented appellants from going into a Court of Equity to enjoin the improvements from being made by the municipality by giving the parties against whom an assessment was made the right, in a legal action, to set up the defense that the whole or any part of the amount of such assessment was not due. The Georgia Court therefore erred in holding that appellants were estopped from denying that they owed said municipality the whole or any part of the assessment sought to be enforced against them.

(e) Georgia Laws (Ga. Laws 1919, p. 934, et seq. and Ga. Laws 1924, p. 534, et seq.) provide that a party against whom an improvement assessment is made under said Acts may, in a legal proceeding brought to enforce said assessment, contest the whole or any part of the amount of the assessment.

Under the decision of the Supreme Court of the State of Georgia said provision of said statutes prevents a party against whom an assessment is made from having the right to enjoin the construction of the improvement and the issuance of an assessment execution therefor.

To the action brought against appellants by the municipality to collect the amount of the improvement assessment in question, appellants set up the defense that they did not owe the whole or any part of said assessment and that said

assessment would deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Georgia Supreme Court in denying the Companies the right to set up their defense to said suit construed the statutes in question so as to deprive appellants of the right to a judicial hearing as to whether they owe the whole or any part of the assessment. Said statutes, as thus construed, are unconstitutional in that appellants are deprived of the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that such construction of the statutes denies appellants the right to any judicial determination as to their liability for improvement assessments.

7. The opinion, judgment and decree of the Supreme Court of Georgia, rendered on September 30, 1935, was erroneous because said opinion, judgment and decree denied to petitioners the equal protection of the law and due process of law and is therefore violative of Section 1, Article 14 of the Constitution of the United States, in that said opinion, judgment and decree denied appellants the right to introduce evidence in said cause on the material issue in said cause or to challenge the fact of their liability or the amount of their liability for the assessment sought to be collected in said case.

8. The opinion, judgment and decree of the Supreme Court of Georgia, rendered on September 30, 1935, is erroneous because said Court held that appellants are estopped by laches from challenging their liability for the paving assessment sought to be enforced against them in said cause, either on the ground that the enforcement of the assessment will deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or as to the fact or amount of liability, as appellants did not institute a

legal action to prevent the street improvement and the assessment against them or their property but waited until the paving was completed and the assessment made and execution issued therefor before calling into question appellants' liability. Said decision is erroneous:

(a) The Acts of the Legislature of Georgia under which the assessment in question was made provide for a hearing on the fact of the liability or the amount thereof after the paving is completed, the assessment made, and an execution issued to collect the assessment. (Georgia Laws 1919, pages 934, et seq. and Georgia Laws 1924, pages 534, et seq.).

(b) As a matter of law and under the said provisions of said Acts (as repeatedly construed by the decisions of the Supreme Court of Georgia), neither appellants nor any other single property owner can maintain an action to prevent the paving of the streets by a municipality upon the sole ground that such person or his property is not or would not be liable for an assessment therefor, nor could appellants or any other single property owner maintain such an action to determine in advance its liability or the amount for which it or its property will be liable for assessment.

(c) In the instant case appellants adopted the only course open to them to determine whether or not they were liable for said assessment, in whole or in part.

The said opinion, judgment and decree of the Supreme Court of the State of Georgia is so arbitrary, so unreasonable, and so without any support in law as to constitute a denial to appellants of the equal protection of the law and due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT AND CITATION OF AUTHORITIES RELIED UPON

(A.)

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

The first, second and third assignments of error will be considered together, as each of these assignments raise the question that the decision of the Supreme Court of the State of Georgia rendered on September 30, 1935, (record pages 129-146) was erroneous and inconsistent with the opinion, judgment, mandate and praecipe issued upon the same record and in the same case by the Supreme Court of the United States on the 29th of April, 1935, (reported in 295 U. S. 165) upon each of the grounds and specifications as set out in said assignments of error.

These assignments of error are set out on pages 4-6 of this Brief and on pages 151-153 of the printed record.

The Supreme Court of the United States has jurisdiction only over final decisions of the highest State court.

Bostwick v. Brinkerhoff, 106 U. S. 3, 4;

Haseltine v. Central Bank, 183 U. S. 130;

Schlosser v. Hemphill, 198 U. S. 173, 175;

Norfolk Turnpike Co. v. Oyster Comm'n, 226 U. S. 99, 101;

Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437;

Gulf Refining Co. v. United States, 269 U. S. 125, 135, 136.

Therefore, whatever was before this court for decision and was considered, passed upon and decided is final and conclusive, and becomes the law of the case.

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any 'other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded.' "

Ex Parte Seabold v. United States, 12 Peters 489, 492.

Washington Bridge Co. v. Stewart, 3 Howard 413, 425.

Ex Parte Dubuque & Pacific Rd., 1 Wallace 69, 73.

Durant v. Essex Company, 101 U. S. 555.

Mackall v. Richards, 116 U. S. 45.

In Re Washington & Georgetown R. R. Co., 140 U. S. 91.

Gaines v. Rugg, 148 U. S. 228.

In Re Potts, 166 U. S. 263.

Ex Parte Union Steamboat Co., 178 U. S. 317.

Kansas City Southern R.R. Co. v. Guardian Trust Co., 281 U. S. 1, 2, (6), 11 and see cases there cited.

No question, once considered and decided by this court, can be re-examined at any subsequent stage of the same case.

In Re Sanford Fork & Tool Co., 160 U. S. 247, 259. (See cases there cited.)

See also:

Washington Bridge Co. v. Stewart, 3 How. 413, 425.

Durant v. Essex Company, 101 U. S. 555, 556.

In *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 456, this Court held:

"It is the settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. Supervisors v. Kennicott, 94 U. S. 498, and cases cited in the opinion; *Clark v. Keith*, 106 U. S. 464; *Chaffin v. Taylor*, 116 U. S. 567; *Northern Pacific Railroad v. Ellis*, 144 U. S. 458; *Great Western Telegraph Company v. Burnham*, 162 U. S. 339, 343."

A praecipe which directs the State court to proceed consistently with the opinion of the Court has the affect of making the opinion a part of the mandate, as thought it had been therein set out at length.

Metropolitan Co. v. Kaw Valley Drainage Dist., 223 U. S. 519, 523.

Gulf Refining Co. v. United States, 269 U. S. 125, 135.

A decision rendered by a majority of this Court is as effective as if all the Judges had concurred therein.

Washington Bridge Co. v. Stewart, 3 Howard 413, 425.

Durant v. Essex Company, 101 U. S. 555, 556.

A dissenting opinion merely shows that the questions therein discussed were before the Court and were considered and determined by the Court in the decision rendered in the case.

The third assignment of error states the questions raised and decided by this Court in its opinion reported in *Georgia Rwy & Electric Co. v. City of Decatur*, 295 U. S. 165, and sets out and specifies the particulars in which the decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, were not in conformity or consistent with the opinion and mandate of this Court.

The mandate and praecipe of the United States Supreme Court directed "that the decree of the said Supreme Court (of Georgia) in this cause be, and the same is hereby reversed." When, on the same record, the Supreme Court of the State of Georgia rendered a judgment of affirmance, it did not comply with the mandate issued in said case by this Court.

Hickman v. Fort Scott, 141 U. S. 415;

Durant v. Essex Co., 101 U. S. 555;

McKnight v. Craig's Administrator, 6 Cranch, 183.

See also:

Gaines v. Rugg, 148 U. S. 228, 239, 240; 241-244.

The opinion of the Supreme Court of the United States was that the Georgia assessment statutes in question contemplate "the existence of benefits to the railway company as the basis for the assessment." This Court's construction of said statutes is final and will not be altered, changed or reversed, in the same case, by this Court after the term in which its decision has been rendered.

Seabold v. United States, 12 Peters, 488, 492;

Schell v. Dodge, 107 U. S. 629.

The Supreme Court of the State of Georgia failed and refused to follow said opinion and decision as the law of the case. To hold that the Supreme Court of Georgia has the power to review, change or alter said decision of the Supreme Court of the United States with reference to said construction of the statutes in question, would give the State Court greater power and jurisdiction over the Court's decision than this Court itself will exercise.

The opinion and decision of this Court held that the existence of benefits resulting from the paving improvement in question was a relevant and material issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States appellants had the constitutional right to introduce pertinent evidence and proof to overcome the rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question; and also held that the failure and refusal of the lower Court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived appellants of due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of Georgia, in its decision rendered on September 30, 1935, denied appellants the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question. Such decision by the Georgia Supreme Court was not in conformity with the decision, opinion and mandate of this Court.

The said opinion and decision of the Supreme Court of the United States held that under the Georgia statutes and ordinances, authorizing and making assessments for the paving improvement against appellants, without any compensating advantage, was and is an arbitrary abuse of power amounting to the confiscation of the property of appellants in contravention of the Fourteenth Amendment to the Constitution of the United States. The said decision of the Supreme Court of Georgia failed and refused to give force and effect to the said opinion and decision of this Court and did not accept or follow it as the law of the case.

When the mandate issued by this Court directed the State Supreme Court to enter a decree of reversal and "remanded

(the case) for further proceedings not inconsistent with the foregoing opinion," the Supreme Court of the State of Georgia did not comply with said mandate, when without any change of the record, without allowing appellants to introduce any evidence, and without remanding the case to the trial Court for a hearing, it entered a judgment of affirmance.

The decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, not only did not accept the opinion of this Court as the law of the case but, in effect, reversed the judgment, opinion and decree of this Court.

(B.)

FOURTH ASSIGNMENT OF ERROR

This assignment of error is set out on page 6 of this Brief and also on pages 153, 154 of the printed record.

This Court in its decision (*Georgia Rwy. & Elec. Co. v. Decatur*, 295 U. S. 165) considered and determined the construction of the Georgia statutes in question, amending the charter of the City of Decatur. The construction placed upon a State statute by the highest Court of a State "becomes part of the statute as much as though it were found in appropriate words in its text."

When such question arises in this Court it has the same authority and duty to decide it as it has to decide any other questions which arise in a cause.

When this Court adjudicates that a State statute has been construed by the highest Court of the State in a certain way, the determination of such question is final and conclusive and the law of the case. In the same case the State Court has no power or authority to reverse the adjudication of this

Court with reference to such question or decision any more than it has to reverse it on other questions which have been raised, considered and decided. (See cases cited under subdivision "A" supra).

In Re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, 64 F. (2d) 915, (5).

The decision of this Court in this case specifically and definitely held that the State statutes in question contemplate "the existence of benefits to the railway as a basis for the assessment." This question was raised, considered and adjudicated. The opinion discusses the contention of the City that the necessity of benefits "is not applicable to street railway companies having tracks in the street improved;" and that the City "seeks to sustain the assessment as an exercise of the police power and the alleged power of the State to alter and amend corporate charters." The dissenting opinion showed that this question was before this Court for its consideration and adjudication. This Court decided adversely to the City's contention and held that the statutes contemplate "the existence of benefits to the railway as a basis for the assessment;" and that "if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain * * * * the assessment amounts to confiscation."

Said decision on this question became the law of the case and fixed the rights of the respective parties in this litigation.

If it can be conceived that the State Court has the power and authority to refuse to follow the decision of this Court as the law of this case, then the assessment statutes in question, as construed by the Supreme Court of Georgia in its opinion rendered on the 30th day of September, 1935, are unconstitutional and repugnant to the Fourteenth Amendment to the Constitution of the United States. The con-

struction placed upon the assessment statutes in said opinion deny to appellants equal protection of the law and due process of law, resulting in the confiscation of appellants' property.

Under such construction all other parties than appellants are only liable for a paving improvement assessment based upon special benefits accruing from the improvement, while as against appellants, an assessment can be made without the necessity of any benefits to appellants or appellants' property.

Street railway companies are entitled to the same and equal constitutional protection accorded others.

44 Corpus Juris, "Municipal Corporations," page 534, Section 2896.

Road Imp. Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

City of Commerce v. Southern Ry Co., 35 Fed. (2d) 331.

Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340, 341.

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427.

United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660.

(C.)

FIFTH AND SEVENTH ASSIGNMENTS OF ERROR

These assignments of error are set out on pages 7 and 11 of this brief and also on pages 154, 155, 157 of the printed record.

What has heretofore been said with reference to the adjudication of this Court in the case at bar as being the law of the case, is applicable to these assignments of error.

When this same case was before this Court (295 U. S. 165), this Court held:

(a) That the evidence offered by appellants was material and competent.

(b) That the refusal of the Court to admit said testimony "amounts to a denial of a hearing on that issue in contravention of the due process of law of the Constitution."

(c) "If the burden imposed is without any compensating advantage (as appellants offered to show) the arbitrary abuse of the power exercised is plain * * * * the assessment amounts to confiscation."

(d) "The offer of appellants to surrender all their railway property within the city, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected."

(e) "The existence of benefits resulting from the improvement was material."

(f) "The refusal of a Court to receive and consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

(g) "The decree of the Court below must be reversed."

As set out in these assignments of error, the decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, denied appellants the reversal which the mandate of the Court directed and on the same record, the State Court entered a decree of affirmance. The State Supreme Court failed or refused to follow any of the foregoing rulings and holdings of this Court.

Aside from the law of the case, the decision of the Supreme Court of Georgia of September 30, 1935, denied appellants the right to introduce evidence and to have a judicial hearing on material issues.

Such denial is in contravention of the due process of law provision of the Federal Constitution.

Saunders v. Shaw, 244 U. S. 317, 319:

Georgia Rwy. & Elec. Co. v. City of Decatur, 295 U. S. 165, and see cases there cited and collected.

This is true whether the special assessment in question is based upon benefits or upon a claimed exercise of police power and authority. Police power is subject to constitutional limitations and a party is entitled to a judicial hearing to determine whether or not it has been arbitrarily or unreasonably exercised.

N. C. & St. L. R. R. Co. v. Walters, 294 U. S. 405.

(D.)

SIXTH AND EIGHTH ASSIGNMENTS OF ERROR

These assignments of error are set out on pages 9 and 11 of this Brief and also on pages 155-158 of the printed record.

The mandate issued by this Court in this case on April 29, 1935, ordered a reversal by the Supreme Court of Georgia. Upon receipt of said mandate and on the same record, the Supreme Court of Georgia entered a judgment of affirmance without remanding the case to the trial Court for a hearing and without giving appellants any opportunity to introduc evidence on material issues. This was not in accordance with the mandate of this Court.

In the opinion rendered by the State Supreme Court on September 30, 1935, the Court said:

> Appellants "stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same. It is therefore too late for such company to avoid payment on the ground that enforcement of the assessment therefor will deprive the company of its property, in violation of the due process clauses of the State and Federal Constitutions."

Such holding was without foundation:

(a) It was not in conformity with the mandate of this Court.

(b) No issue of estoppel was raised by the pleadings and there was no evidence in said case establishing an estoppel.

In the previous litigation brought by the municipality against appellants to collect the paving assessment in question no claim was made by the municipality that appellants were estopped from contesting their liability therefor.

Georgia Power Co. v. City of Decatur, 170 Ga. 699;

Georgia Power Co. v. City of Decatur, 173 Ga. 219.

No issue or claim of estoppel was raised or made by the municipality in the present litigation.

Georgia Power Co. v. City of Decatur, 179 Ga. 471.

(c) The municipality is judicially estopped from claiming an estoppel. In previous litigation the municipality successfully contended that appellants could not contest the legality or constitutionality of the assessment, nor appel-

lants' liability for the assessment until the improvement had been completed and the municipality was undertaking to enforce an assessment therefor against appellants.

Before the municipality made the improvement, appellants notified the City of Decatur that neither they nor their property could receive any benefits from the paving and that no legal or valid assessment could be made against appellants or appellants' property therefor; and offered and tendered to the municipality its street railway property and franchise located within the municipality. The City of Decatur refused such tender and immediately brought suit in the Superior Court of DeKalb County compelling appellants to operate its street railway lines within the municipality. In answer to said suit defendants sought to plead that neither they nor their property would receive any benefits from the paving improvement; that the assessment against them would be unconstitutional and that no legal or valid assessment could be made against appellants.

In said litigation the municipality successfully contended that these questions could not be pleaded, raised nor adjudicated until the municipality had constructed and completed the improvement and was undertaking to collect the assessment against appellants.

In "Appendix A" to this Brief there are set out extracts from the Brief of the municipality, filed in the Supreme Court of Georgia, in said litigation.

The decision of the Supreme Court of Georgia in said case is reported in *Georgia Power Co. v. City of Decatur*, 168 Ga. 705.

(d) Appellants adopted the procedure and the only procedure permitted and prescribed under the assessment statutes in question.

The municipality's suit against appellants was predicated and based upon a paving assessment execution. The execution was issued under and by virtue of Georgia Laws 1919, pages 934 et seq. and Georgia Laws 1924, pages 534 et seq. Under said statutes appellants are given no right to prevent the paving and have no right to a hearing with reference to their liability for the assessment until after an assessment execution has been issued and the municipality is undertaking to collect therefor. Said statutes provide the only remedy or procedure open to appellants to determine whether or not they are liable for the improvement assessment in whole or in part.

Said Acts provide:

"Provided that the defendant in such execution shall have the right to file an affidavit denying that the whole or any part of the amount of such execution is due, and stating what he admits to be due, if any, which amount so admitted to be due shall be paid before the affidavit shall be received, the said affidavit to be filed with the marshal of said city and when received shall be returned by him to the Superior Court of DeKalb County and there tried and the issue determined as in cases of illegality, subject to all the penalties provided by law in cases of illegality for delay."

Under reported decisions of the Supreme Court of Georgia, such provision in a statute prohibits a property owner from going into Court to prevent the municipality from constructing the paving improvement and from raising or contesting the fact or amount of liability until the assessment execution is sought to be enforced against the property owner by the municipality.

Rice v. Mayor and Council of Macon, 117 Ga. 401;

Wright v. Mayor and Council of Macon, 117 Ga. 504;

Mayor and Council of Gainesville v. Dean, 124 Ga. 750;

Mayor, etc., of Washington v. Moseley, 41 Ga. App. 439; 442.

A property owner is not entitled to be heard in advance upon the fact or the amount of his liability, or the question of benefits or confiscation resulting from the assessment.

Horkan v. City of Moultrie, 154 Ga. 444; 449; 450.

When the municipality instituted the present action at law, seeking to recover a general judgment against appellants for the amount of the assessment execution, appellants adopted the only procedure open to them to determine whether or not they were liable for the paving assessment in question in whole or in part.

(e) When appellants adopt the only procedure allowed to them under the assessment statutes in question, there can be no estoppel. A denial of their right to set up this defense in the present action is a denial to them of any judicial hearing whatever. Such denial in and of itself contravenes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Saunders v. Shaw, 244 U. S. 317;

Georgia Rwy. & Power Co. v. Decatur, 295 U. S. 165.

If the statutes be construed as denying appellants the right to any hearing, then the statutes as thus construed, are likewise unconstitutional.

(f) Appellants were given no hearing and no opportunity to be heard on the question of estoppel. The issue of estoppel was not raised by the pleadings. Under the due process of

law provision of the Federal Constitution appellants are entitled to a notice and a hearing on material issues.

All the testimony and evidence offered and tendered by appellants was excluded. This excluded evidence would have affirmatively established that appellants did not stand by and see the paving done and the expense incurred. In its opinion (*Georgia Rwy & Elec. Co. v. Decatur*, 295 U. S. 165) this Court held that "the offer of appellants to surrender all their railway property within the City, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected." Such tender was made prior to the construction of the paving and prior to the municipality's incurring any expense therefor. This, and the other excluded testimony, (record pages 87-109) would have affirmatively established that there was no basis for an estoppel against appellants.

(g) Estoppel may arise where a property owner accepts benefits and then undertakes to avoid payment therefor. In the case at bar appellants were denied the right to establish that they received no benefit whatever from the paving assessment in question.

No estoppel arises where the property or property owner is not benefited by the improvement.

O'Brien v. Wheelock, 184 U. S. 430.

Evidence of estoppel by the acceptance of benefits would be rebuttal or in the nature of a replication to appellants' defense. In the instant case appellants were denied the right to show that they had received no benefits.

There is no evidence in the record to show estoppel by conduct. Any such theory is refuted by the evidence. It

is undisputed that appellants offered to surrender all their railway property within the city, including the franchise. Such evidence refutes any possibility that the City of Decatur was induced by appellants' conduct to embark upon the improvement in question, under an assumption that appellants would be benefited to such an extent by the improvement that appellants would never call in question the amount of the assessment or the question of benefits. The decision of the Supreme Court of Georgia in holding that appellants were estopped, denied appellants due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

(h)The Georgia cases of estoppel cited by the Supreme Court of Georgia in its decision of September 30, 1935, are not applicable to the assessment statutes in question. Those cases are based upon the fact that in a judicial hearing it was established that the property owner had accepted benefits, and had failed to follow the procedure provided by the special assessment acts under which the assessment was made. The acts in said cases contain provisions essentially different from those under which the improvement in question was made.

Respectfully submitted,

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APPENDIX "A"

Extracts from the Brief of the City of Decatur, as filed in the Supreme Court of the State of Georgia in the case of *Georgia Power Co. v. City of Decatur*, 168 Ga. 705:

"There is another reason why this particular complaint about the paving ought not to be considered. It sets up the contentions that the paving is no benefit, and that, therefore, the defendants ought not to pay it. The law which authorizes these paving charges provides, for such an issue as that, a defense by affidavit of illegality, and it is elementary law that in such cases the defense *must be presented that way and no other.*

"The law under which this assessment is made will be found in the Acts of 1919, page 934.

"It provides for defense by way of affidavit of illegality. Among the decisions applicable generally to such defenses may be mentioned

Hart v. Lagaron, 46 Ga. 396
Ansley v. Glendenning, 56 Ga. 286
Russell v. O' Dowd, 48 Ga. 475, (3)
Hitchcock v. Culver, 107 Ga. 184, (2)
Park v. Callaway, 128 Ga. 119 (4)
Roney v. McCall, 128 Ga. 249 (2)
Mathews v. Gelders, 129 Ga. 103 (2)
Williams v. Kennedy, 134 Ga. 339 (1)
Smith v. Murphy, 140 Ga. 80
Daniel v. Rosenheim, 152 Ga. 278 (2)

"Cases in which the principle has been applied spec-

ially where street improvements were involved will be found as follows:

Regenstein v. Atlanta, 98 Ga. 170

Gainesville, v. Dean, 124 Ga. 750

Rice v. Macon, 117 Ga. 401

"Other like instances are:

Lanham v. Rome, 136 Ga. 398

Waycross v. Cowart, 164 Ga. 721

Cotton Mill v. Social Circle, 163 Ga. 465."